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No. 02-1624

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IN THE

# Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT and
DAVID W. GORDON, SUPERINTENDENT,
*Petitioners*,

v.

MICHAEL A. NEWDOW, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

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# BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

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[1] The parties have consented to the filing of this brief and copies of the letters of consent are being filed with the Clerk. No person, organization or corporation other than the *amicus* and the organizations named herein have assisted in or contributed to the preparation of this brief.

## INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. Over the past 35 years, COLPA has filed *amicus curiae* briefs in this Court in 29 cases involving the Religion Clause of the First Amendment.[2]

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[2] *Locke v. Davey*, No. 02-1315 (2003); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Agostini v. Felton*, 521 U.S. 203 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986); *Ohio Civil Rights Com'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Dewey v. Reynolds Metals Co.*, 402 U.S 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970); *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).



COLPA submits this *amicus* brief on behalf of, and is joined by, the following seven national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America is the nation's largest grassroots Orthodox Jewish organization, with chapters in 36 states and over 50 cities throughout the United States.

- National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

- The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

- The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply concerned with issues related to religious freedom.

- Torah Umesorah-The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish day schools across the United States and Canada.

- The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America, representing nearly one thousand congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

Each of these organizations subscribes to the view that American society is best served when religion is allowed to flourish, and that attempts to maintain an impregnable "wall of separation" between church and state – including efforts to remove any mention of God from governmental discourse – may constitute government hostility to religion and may inhibit conscientious expressions and observances of faith.

The second Question Presented in this Court's Order of October 14, 2003, granting, in part, the petition for a writ of certiorari is of immense symbolic significance to Americans of all faiths. A majority of the court below has held that the United States Constitution forbids an uncoerced daily recitation by public-school children of the fact that the United States is "one nation under God." The Orthodox Jewish community comprises only a minute fraction of the



total population of this land, and its adherents acknowledge Divine Providence in many ways that differ from, and extend beyond, the acknowledgment in the Pledge of Allegiance. But we believe that it is historically accurate and morally essential that the guidance of a Supreme Being in unifying the diverse cultures of the United States and in creating a single nation that is "indivisible" be recognized in a declaration of patriotic allegiance to the United States of America.

The American Orthodox Jewish community is proud to be among the citizenry of "a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952), reaffirmed in *Lynch v. Donnelly,* 465 U.S. 668, 675 (1984). We do not dismiss the reference in the Pledge of Allegiance to "one nation under God" as *de minimis* or as devoid of its literal meaning. It is a profound expression of conscience that places this nation in the front rank of civilized societies.

The decision of the majority of the court below is, in our view, a repudiation of a guiding principle that has given luster to this Nation's history since its creation. The United States has become a great and powerful country and leader of the free world because it has consistently recognized that it is not "my strength and the might of my own hand" (*Deuteronomy* 8:17) that has conferred wealth and success on America, but that the Nation has prospered "under God" – *i.e.,* because it has been blessed by the Almighty.

Jewish tradition teaches that human recognition of God is the hallmark of civilization. In all recorded history -- from the age of Noah, by Jewish belief -- civilized societies have banned murder, robbery and other forms of immorality, and have established courts of law to protect liberty and administer justice. By the same token, according to Jewish

teaching, civilization cannot exist without the acknowledgment of God.

A declaration in our Pledge of Allegiance that we are "one nation under God" is not a preference of one theological teaching over another, or an official endorsement of any one faith or group of beliefs. It is, rather, the expression of what has always been acknowledged by humankind – that man's destiny is shaped by a Supreme Being. Although the Jewish credo assigns distinctive attributes to the God of Israel, the prophet Micah recognized that in our times "all the people will go forth, each in the name of his God" (*Micah* 4:5). The text of the Pledge of Allegiance recognizes that self-evident truth, fully confirmed by American history, on behalf of the people of the United States of America.

## ARGUMENT

### I.

### THE COURT SHOULD DECIDE THE MERITS OF THE CONSTITUTIONAL CHALLENGE TO THE PLEDGE

In this *amicus* brief we do not address the first of the Questions Presented by this Court's limited grant of certiorari – *i.e.*, whether a noncustodial parent has standing to challenge recitation of the pledge in his or her child's classroom. Regardless of how the Court resolves that threshold technical issue, we urge it to decide the very significant second Question Presented. Unless corrected by this Court, the Ninth Circuit's split decision will spawn other judicial challenges to the Pledge of Allegiance and to the many symbolic acknowledgments of God that are prevalent



in today's society. Lawyers and organizations that hope to eradicate these acknowledgments from our public life will view a decision based exclusively on standing grounds as an indication that the Court may be receptive to Establishment Clause challenges to any governmental recognition of God. This will encourage the initiation of lawsuits and the expenditure of substantial judicial, governmental and private resources on a fundamental proposition that this Court can resolve forthwith by deciding the case now before it on its constitutional merits.

The prudential justification for reaching the merits even if the Court were to determine that the respondent lacked standing to initiate this action is similar to the justification for deciding cases that may be moot by the time they reach this Court. The Court has reached the merits in such instances -- even though there is arguably no existing case or controversy once a dispute between the initial parties has become moot -- when it has also found that the legal issue is "capable of repetition, yet evading review." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 n.48 (1996); *Norman v. Reed*, 502 U.S. 279, 288 (1992); *International Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 178-179 (1968). Although we cannot say that the constitutional challenge made in this case will invariably "evade review," the constitutional issue is surely likely to be repeated, and court battles may generate significant disruption and needless controversy in many jurisdictions across the country before the question again reaches this Court's docket.

## II.

## THE WORDS "ONE NATION UNDER GOD" ARE NOT A "PROFESSION OF A RELIGIOUS BELIEF"

Just as statutory construction begins with the language itself, an analysis of the current text of the Pledge of Allegiance should begin with an examination of the specific challenged words and where they appear in the 31-word pledge. The words "under God" are not, in and of themselves, terms of worship or a declaration of belief. Had they been inserted at the beginning of the text to modify the verb "pledge" – *i.e.,* "Under God I pledge allegiance . . ." or "I pledge, under God, allegiance . . ." or "I pledge allegiance under God" – the declarant might be said to be expressing a religious verification for the integrity of his pledge. (This would be similar to the phrase "so help me God" that concludes many official oaths.) When, as is true of the actual challenged text, the words "under God" describe the object of the pledge – the one indivisible nation that is represented by the flag – and not the nature of the pledge, it is manifest that the speaker is neither praying nor pronouncing a religious catechism.

The Ninth Circuit majority invalidated the Pledge of Allegiance because it said that inclusion of the words "under God" amounted to "a profession of a religious belief, namely, a belief in monotheism." 292 F.3d at 607. That finding is, as a grammatical matter, patently erroneous, as is the majority's corollary – that "[t]o recite the Pledge is not to describe the United States; instead it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and – since 1954 – monotheism." *Id.* The reciter of the Pledge is not committing himself to any "values" whatever; he declares his allegiance to the Flag and



"to the Republic for which it stands." The "values" specified in the Pledge, under a grammatical parsing of the 31-word sentence, describe the Republic to which allegiance has been pledged. An individual who ardently desires that the country return to the decentralized non-unified governmental structure of the Articles of Confederation, or who believes that the Nation is (or should be) divisible into racial and geographic components, or who would confer more "liberty" on citizens than on aliens could, with a good conscience, declare his allegiance (notwithstanding his disagreement with one or more of its policies) to a Republic that is unified, indivisible and grants equal "liberty" to all its inhabitants.

An alternative reading of the Pledge, espoused by Justice Brennan, places its recitation even further from the realm of affirmation of God. Rather than actually describing the existing Republic today as "under God," the "reference to divinity in the pledge of allegiance . . . may merely recognize the historical fact that our nation was believed to have been founded 'under God.'" *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 303-304 (1963) (Brennan J., concurring).

Including the words "under God" in the Pledge of Allegiance is, for these reasons, a lesser "profession of a religious belief" than the ubiquitous National Motto "In God We Trust" which appears on coins and currency and adorns many governmental buildings. "In God We Trust" expresses a personal reliance on a Supreme Being. And the words with which this Court and most judicial bodies in the United States call their sessions to order – "God save the United States and this Honorable Court" – are much more akin to actual prayer than is the reference in the Pledge to "one nation under God."

We submit that none of these invocations of God (including "so help me God" at the close of an official oath) is a constitutionally impermissible "endorsement of religion." But of all the common public manifestations or public expressions that invoke God, the Pledge of Allegiance is the *least* vulnerable to a claim that it is a "profession of a religious belief."

## III.

## IT IS HISTORICALLY ACCURATE TO DESCRIBE THE UNITED STATES AS "ONE NATION UNDER GOD"

The Ninth Circuit majority condemned the 1954 Act of Congress that added the words "under God" to the Pledge of Allegiance on the ground that its purpose – "to differentiate the United States from nations under Communist rule" by "deny[ing] the atheistic and materialistic concepts of communism" – "was to advance religion" and thereby violated the first of the three prongs of the Establishment Clause test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971). 292 F.3d at 610.

The Establishment Clause does not, however, require government officials to falsify history. It is an indisputable fact that throughout American history religion and respect for God had primacy in the minds and expressions of public officials. The 1954 House Report quoted in the majority opinion was entirely accurate in describing why the American Nation was, in contrast to its rivals in the Soviet Communist bloc, "one nation under God" (H.R. Rep. No. 83-1693 at 1-2 (1954)):



> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator.

The text of the Declaration of Independence, with its explicit references to "Nature's God" and to the "Creator," as well as its concluding "firm reliance on the protection of divine Providence," is, standing alone, proof for this Congressional finding. And the signers of the 1778 Articles of Confederation attributed to "the Great Governor of the World" the inclination in "the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union." In addition, there are hundreds of illustrative expressions by American Presidents and other high-ranking government officials of their "dependence . . . upon the moral directions of the Creator" and acknowledgments of His blessings, not the least of which is the standard "God bless America" with which important Presidential addresses invariably conclude.

We add one remarkable example that is of particular interest to this *amicus curiae.* George Washington's celebrated letter of May 1789 to the Hebrew Congregation of Savannah, Georgia, in response to its letter congratulating him on being elected President of the United States, ended with an acknowledgment of God's role in the establishment of the Nation that could never have been uttered by a Lenin

or a Stalin (Schappes, *A Documentary History of the Jews in the United States* (Schocken 1971), p. 78) (emphasis added):

> May the same wonder-working Deity, who long since delivering the Hebrews from their Egyptian Oppressors planted them in the promised land – *whose providential agency has lately been conspicuous in establishing these United States as an independent nation* – still continue to water them with the dews of Heaven . . . .

An additional manner in which the United States has demonstrated that it is "one nation under God" is its historically extraordinary acceptance and accommodation of diverse religious faiths. This phenomenon was recently surveyed by Harvard University Professor William R. Hutchison, in *Religious Pluralism in America* (Yale University Press 2003). Notable immigrants and visitors from abroad such as de Crevecoeur (in *Letters From an American Farmer* (1782)) and de Tocqueville (in *Democracy in America* (1834-40)) wrote admiringly of the religious pluralism that was unique to its time. See Hutchison, *op. cit.* at 11-14, 59-60. In this regard, as well, there is proof in a 1790 exchange of letters between the Jewish congregation of Newport, Rhode Island, and President George Washington that speaks of "liberty of conscience" as an "inherent natural right" and in which both correspondents extol the government of the United States "which gives to bigotry no sanction, to persecution no assistance." Schappes, *op. cit. supra,* at 79-81. The leadership of the new nation was plainly committed to a country in which all inhabitants of any religious persuasion could comfortably live in unity "under God."



## IV.

## ACKNOWLEDGING THAT AMERICA IS A NATION "UNDER GOD" IS A NONSECTARIAN EXPRESSION OF A CIVILIZED SOCIETY

The Ninth Circuit majority erred again in its interpretation of the words "one nation under God" as "an attempt to enforce a 'religious orthodoxy' of monotheism." 292 F.3d at 609. Neither the legislative history of the 1954 statute that incorporated "under God" in the Pledge nor contemporary common usage excludes non-monotheistic faiths by the reference to God. God is understood by the American public in today's discourse as inclusive of the religious force that guides human behavior even according to beliefs that are not Jewish, Christian, or Muslim. See, *e.g,* Miller & Kenedi, *God's Breath: Sacred Scriptures of the World* (Marlowe & Company 2000); Eck, *Encountering God* (Beacon Press 1993); Armstrong, *A History of God* (Ballantine Books 1993), pp. 83-87, 263-264. See also *United States v. Seeger,* 380 U.S. 163, 165-66 (1965).

Moreover, recognition of "the dependence of our people and our Government upon the moral directions of the Creator" (as expressed in the 1954 House Report quoted by the court below, 292 F.3d at 610) is an expression of a civilized society rather than an endorsement of a particular creed. James Madison, frequently cited as the Founder who gave content to the First Amendment's Establishment Clause (see, *e.g., Everson v. Board of Education of Ewing,* 330 U.S. 1, 13, 31, 34 (1947); *Lee v. Weisman,* 505 U.S. 577, 589-590 (1992)), said in his famous *Memorial and Remonstrance,* "Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe" (Quoted in the Court's Appendix to *Everson,* 330 U.S. at 64). Madison also declared: "The

belief in a God All Powerful wise and good, is so essential to the moral order of the world and to the happiness of man, that arguments which enforce it cannot be drawn from too many sources nor adapted with too much solicitude to the different characters and capacities impressed with it." Letter to Frederick Beasley, November 20, 1825, in 3 *Letters and Other Writings of James Madison* 503, 503-04 (1867).

Jewish teaching is that a belief in God – even if not in the precise Divinity revealed to the Jewish people at Sinai – has always been one of the hallmarks of a civilized society. Just as the peoples of the world prohibit murder, robbery, and incestuous sexual relations, and just as they establish courts of law and administer justice, they recognize the existence of God.

Maimonides, the great Twelfth Century Jewish philosopher and codifier, began his epic work *Mishneh Torah* with the following observation (Twersky, *A Maimonides Reader* (Behrman House 1972), p. 43: "The basic principle of all basic principles and the pillar of all sciences is to realize that there is a First Being who brought every existing thing into being." That "basic principle" applies to all mankind, and not just to adherents to the Jewish faith.

In fact, every ancient and modern civilized society up to and including the Seventeenth Century adhered to this "basic principle" and believed in the existence of a Divinity who had a lesser or greater interest in the affairs of men. Throughout history, these beliefs were formed by faith, tradition, reason alone, or a combination of the three. And even in the modern age, such belief has re-emerged in philosophical and theological scholarship as properly basic and fundamental. *See e.g.* Alvin Plantinga, *Faith and Rationality: Reason and Belief in God*, (University of Notre



Dame Press, 1983); Richard G. Swinburne, "The Justification for Theism" in *Truth*, Vol 3, Section II (1991) ("the hypothesis of the existence of God makes sense of the whole of our experience and . . . does so better than any other explanation which can be put forward.")

Finally, the fact that the words "under God" may be deemed offensive or unacceptable to the minority of professed atheists in the United States does not justify their eradication from the Pledge of Allegiance. According to Mayer, Kosmin and Keysar, *2001 American Religious Identification Survey* (City University of New York), only 0.4% of the nation's population declares itself "atheist." No one -- atheist, agnostic, or nonbeliever -- is *compelled* to recite the Pledge of Allegiance or any words in the Pledge that he or she finds offensive. Hence this is not an instance in which a minority faith is coerced into violation of its principles. The issue in this case is only whether the view of atheists may preclude recitation of "one nation under God" by an overwhelming majority that subscribes to it as historical fact, as an expression of a civilized society, or even as a declaration of religious belief.

## V.

## PROHIBITING THE INCLUSION OF "UNDER GOD" IN THE PLEDGE WOULD ENDORSE IRRELIGION

We turn finally to the practical impact of the decision of the Ninth Circuit and to the effect of a potential ruling by this Court in 2004 that the words "one nation under God" are prohibited by the First Amendment to the United States Constitution. Such a declaration would be a major manifestation of hostility to religion because it would eradicate the reference to God that has been part of the Pledge of Allegiance for half a century and has been approved in majority opinions of this Court (*County of Allegheny v. ACLU,* 492 U.S. 573, 602-603 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984)) and in separate opinions by 13 Justices. See Petition of the United States for a Writ of Certiorari in this case, pp. 14-19.

Three Justices of this Court applied a comparable standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 854-869 (1992), when they rejected arguments that they should overrule *Roe v. Wade,* 410 U.S. 113 (1973). While acknowledging "reservations . . . in reaffirming the central holding of *Roe*" (505 U.S. at 853) and expressing "personal reluctance" to subscribe fully to *Roe* (505 U.S. at 861), the Justices adhered to that decision because of the harmful consequences to the judicial system of overruling that precedent.

By the same token, approval of the result reached by the Ninth Circuit majority would not be a neutral act by this Court. It would be read by the citizenry of this nation, in light of past precedent (whether or not it be *dicta*) and 50 years of established practice, as a blow to those who do



believe in God and view their country as "one nation under God."

This Court has consistently held that the Establishment Clause not only bars state action intended to advance or endorse religion, but also action intended to "disapprove of," "inhibit," or evince "hostility" toward religion. See *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("Our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."); *Rosenberger v. Rectors and Visitors of Univ. of Virginia,* 515 U.S. 819, 845-846 (1995); *Board of Ed. of Westside Community Schools v. Mergens,* 496 U.S. 226, 248 (1990). Removal of the words "under God" from our national pledge is not neutrality. Far from signaling the Constitution's commitment to neutrality, the conspicuous absence of these two words will signal, at least to the overwhelming majority of reciters, an action that "bristles with hostility to all things religious." *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting).

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be reversed on its merits with directions to dismiss the complaint.

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Respectfully submitted

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